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STATEMENT BY

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BEFORE THE

SENATE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING DEPARTMENT OF VETERANS AFFAIRS
HEALTH CARE LEGISLATION

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The American Federation of Government Employees, AFL-CIO (AFGE) thanks you for the opportunity to testify today on behalf of the nearly 160,000 AFGE members working at the Department of Veterans Affairs (VA), more than two-thirds of whom are on the front lines caring for veterans at VA hospitals, clinics and long term care facilities. AFGE's testimony will focus primarily on pending personnel legislation.

In my nearly 25 years as a registered nurse and union official at the Salisbury, North Carolina VA Medical Center, I have seen the impact of many Veterans Health Administration (VHA) personnel policies on provider recruitment and retention providers. In the 1980s, I saw first hand how good labor-management relations helped transform the VA into a world-class health care system, enabling the VA to become a model in patient safety, health care information technology, and best practices due to regular collaboration between front line providers and management. Sadly, what I have seen over the past seven years is a sea change in VA's personnel practices that now hurt, rather than help recruitment and retention, and exclude front line providers from medical affairs. We are extremely grateful to Chairman Akaka and other members of the Committee for their efforts to make VHA's personnel practices more competitive, transparent and equitable.

S.2969. Veterans' Medical Personnel Recruitment and Retention Act of 2008

We greatly appreciate Chairman Akaka's comprehensive effort to address VA nurse recruitment and retention in this legislation. AFGE supports S. 2969 except for the provision in Section 2(a) to expand the Secretary's Title 38 authority.

Section 2(b) provides a long overdue adjustment to the rules that apply to part-time registered nurses (RN), allowing them to earn the rights of permanent employment and to retain permanent status if previously full-time. The flexibility of a part-time schedule is a valuable recruitment and retention tool in today's nursing shortage.

Section (3):

Mandatory Overtime: Fifteen states already limit the amount of overtime that a nurse can be forced to work. State legislatures enacted these protections because of a growing body of research finding that prolonged overtime puts both the nurse and patient at risk. It is time for the VA to implement its own evidence-based overtime policy using a common definition of emergency to mandate longer hours. Section 3 will establish a sensible and safe overtime policy that ensures that all nursing positions are equally protected:

Pay:

Section 3 will ensure that VA pay policies are more consistent and competitive. Lifting the current pay caps for Certified Registered Nurse Anesthetists and Licensed Practical Nurses will enable facilities to offer these employees needed pay incentives. Clearer rules on premium and overtime pay for all nursing positions will increase the uniformity of VA pay policies and decrease nurse frustration.

Management training on the nurse locality pay process will increase compliance with the 2000 nurse locality pay law that Congress enacted to address recruitment and retention; greater employee access to pay survey data will add accountability to the locality pay process to ensure that surveys are done timely and properly and that needed pay adjustments are made. AFGE is strongly opposed to any proposal that lessens accountability for nurse pay policies, including the proposal in Section 304 of S. 2984 to eliminate current reporting requirements, as will be discussed.

An effective nurse locality pay process also serves the interests of veterans who cannot get hospital beds due to staffing shortages, and the interests of taxpayers footing large bills for agency nurses and diversion of patients to non-VA hospitals.

Section 4 provides a much needed boost to the Educational Debt Reduction Program (EDRP). This program has a long and impressive track record in attracting new nurses to the VA and supporting current employees who want to pursue RN careers in the VA.

Section 2(a):

AFGE strongly objects to Section 2(a). Conversion of nursing assistants to hybrid Title 38 and expanded Secretary discretion to convert other positions will devastate a severely backlogged hybrid appointment process. Employees already face extreme delays in appointment and promotion. Ironically, we hear reports that on average, it is quicker to hire or promote under Title 5, even though Congress' top objective in establishing hybrid positions was to provide a faster alternative to Title 5.

Delays in hybrid appointments have already hurt the VA's ability to expand its mental health capacity to treat OIF/OEF veterans. For example, all new hybrid employees were supposed to be boarded by September 30, 2006 but many VA psychologists are still waiting to be boarded; AFGE waited over four years for social worker qualification standards.

Hybrid Title 38 employees are not covered by the same veterans' preference rules as their Title 5 counterparts. Therefore, expanded hybrid authority will adversely impact veterans' employment opportunities at the VA - - the federal agency that should be a model employer for others.

In the alternative, AFGE recommends that the VA suspend future hybrid appointments pending the completion of a pilot project using a streamlined Title 5 hiring process and comparative study of the two systems. AFGE would like to work with the Committee to develop this pilot project. It can also provide valuable lessons for other federal agencies.

S. 2824. Title 38 Collective Bargaining rights and Procedures for review of adverse actions

AFGE supports S. 2824. We greatly appreciate the leadership of Senator Rockefeller in introducing this urgently needed legislative remedy to the current personnel crisis at VHA. We also extend our gratitude to original cosponsors, Committee members Webb and Brown, and Senator Mikulski, for cosponsoring S. 2824.

S. 2824 is an essential companion to any past or future legislation that addresses VHA recruitment and retention of the following providers ("provider"): RNs, physicians, physician assistants, chiropractors, podiatrists, optometrists, dentists and expanded-duty dental auxiliaries (also known as "pure Title 38" or "non-hybrid Title 38" employees.)

S, 2824 will reverse the damaging and unintended consequences of the 1991 law that added Section 7422 ("7422") to Title 38. Section 7422 widely impacts employee rights in grievances, arbitrations, labor-management negotiations, unfair labor practices (ULP) and litigation before the Federal Labor Relations Authority (FLRA) and courts.

S. 2824 will curb the VA's widespread noncompliance with federal laws that make the VA a desirable place to work such as physician and RN pay laws, limits on nurse overtime, rights to information and equal employment laws. Current 7422 policy has undermined nearly every recent Congressional attempt to address VHA recruitment and retention, leaving providers with "rights without remedies" which, according to the old adage "are no rights at all."

How can one section of the law cause so much harm to these valuable members of VA's health care workforce? That harms result from management's arbitrary interpretation of three narrow exceptions in the law to block provider rights: professional conduct and competence (defined as direct patient care or clinical competence); peer review; and compensation.

Management's 7422 policy is arbitrary because it directly contradicts Congressional intent as to the scope of these three exceptions. Specifically:

- Congress viewed Title 38 and Title 5 employees as having the same collective bargaining rights when it enacted the Civil Service Reform Act (CSRA) in 1978.
- Congress enacted Section 7422 in direct response to a 1988 federal appeals court decision involving annual nurse "comparability pay" increases. The Court held that the VA could not be compelled by the CSRA to engage in collective bargaining over conditions of employment for Title 38 providers. Colorado Nurses Ass'n v. FLRA, 851 F.2d 1486 (D.C. Cir. 1988).

- The plain language of the 1991 law narrows the scope of the exceptions by specifying that the matter must relate to "direct patient care" or clinical competence."

• The 1990 House committee report on the underlying bill defined the "direct patient care" exception as "medical procedures physicians follow in treating patients." This report also cited guidelines for RNs wishing to trade vacation days as falling outside the exception. (H. Rep.No. 101-466 on H.R. 4557,101st Cong., 2d Sess., 29 (1990)).

Management's 7422 policy is also arbitrary because it contradicts its own 1996 agreement with labor to clarify the scope of the law and resolve remaining disputes in a less adversarial manner. Sadly, the VA unilaterally abandoned this useful, inclusive agreement in 2003. More specifically, in that agreement:

- The VA committed to a new process for resolving 7422 disputes that departed from the "adversarial, litigious, dilatory..." nature of past labor-management relations."
- The VA acknowledged that providers provide valuable input into medical affairs: "We recognize that the employees have a deep stake in the quality and efficiency of the work performed by the agency."; "The purpose of labor-management partnership is to get the front line employees directly involved in identifying problems and crafting solutions to better serve the agency's customers and mission."
- The VA recognized the narrow scope of the direct patient care exception, i.e. it does not extend to "many matters affecting the working conditions of Title 38 employees [that] affect patient care only indirectly" (emphasis provided).
- The VA agreed that scheduling matters may be grievable: "For example, scheduling shifts substantially in advance so that employees can plan family and civic activities may make it more expensive to meet patient care standards under certain circumstances. That does not relieve management of either the responsibility to assure proper patient care or to bargain over employee working conditions."
- The VA agreed that pay matters other than setting pay scales are grievable: "Under Title 38, pay scales are set by the agency, outside of collective bargaining and arbitration. Left within the scope of bargaining and arbitrations are such matters as: procedures for collecting and analyzing data used in determining scales, alleged failures to pay in accordance with the applicable scale, rules for earning overtime and for earning and using compensatory time, and alternative work schedules."

The 7422 appeals process: Section 7422 gives the Undersecretary of Health (USH) the sole authority to determine what matters are grievable. USH decisions are posted on the VA website. AFGE is not informed about unpublished decisions or pending cases.

A review of posted decisions and member reports received by AFGE reveals how VA's 7422 policies directly undermine recruitment and retention legislation passed over the past decade and deprive providers of a fair appeals process. For example:

- No right to grieve over denial of request to review nurse locality pay survey data

o Background: Congress enacted legislation in 2000 to authorize directors to conduct third party surveys to set competitive nurse pay (P.L. 106-419)

o USH Ruling: "Compensation" exception blocks employees' access to third party survey data. (Decision dated 1/06/05)

- No right to grieve over VA nurse mandatory overtime policy

o Background: Congress enacted legislation in 2004 requiring facilities to establish policies limiting mandatory overtime except in cases of "emergency" (P.L. 108-445)
o USH Ruling: National grievance over definition of "emergency" for requiring overtime is barred by the "professional conduct or competence" exception. (Decision dated 10/22/07)

- No right to grieve over composition of panels setting physician pay

o Background: Congress enacted legislation in 2004 to use local panels of physicians to set market pay that would be competitive with local markets (P.L.108-445). AFGE contended that management unfairly excluded practicing clinicians and employee representatives from the panels.
o USH Ruling: Grievance barred by "compensation" exception. (Decision dated 3/2/07)

- Other grievances blocked by VA's 7422 policy (based on member reports of pending disputes or unpublished USH decisions)

o No right to challenge Intimidation of arbitration witnesses: After two VA nurses testified for the union at arbitration, management sent them letters questioning their conduct and suggesting that they could be subject to discipline. The union filed an unfair labor practice with the FLRA which initiated steps to file charges against management. Management invoked the "professional conduct or competence" exception to suspend FLRA action pending an USH ruling.
o No right to challenge performance rating based on use of approved leave: Management invoked 7422 when a nurse tried to grieve the lowering of her performance rating that was based on her authorized absences using earned sick leave and annual leave, and carried out without any written justification.
o No right to challenge error in pay computation: Management invoked 7422 when a nurse was incorrectly denied a within-grade pay increase because of lost time arising out of a work-related injury covered by workers compensation.
o No right to challenge low reimbursement for costs of required training: Management invoked 7422 when a nurse tried to grieve the amount of reimbursement she received for attending required training to maintain her Advanced Practice RN certification.
o Exclusion from hospital affairs: Management invoked 7422 to block a local union's efforts to have input into the drafting of medical staff bylaws that impact personnel policies.
o No right to challenge unfair bonus policies: VA physicians are unable to challenge policies that are not in compliance with the 2004 physician pay law because managers set arbitrarily low bonuses and impose unfair performance measures based on factors beyond the physician's control.

Recent court decisions upholding the VA's 7422 policy highlight the need for Congressional action to enforce critical workplace rights and recruitment and retention legislation:

- In AFGE Local 446 v. Nicholson, 475 F.3d 341 (D.C. Cir. 2007). The federal court held that the VA operating room nurses could not file a grievance over denial of premium pay weekend and evening shifts.

• In AFGE Local 2152 v. Principi, 464 F.3d 1049 (9th Cir. 2006), a VA physician was removed from his surgical duties at age 76 and his specialty pay was discontinued. The court held that the physician's grievance alleging unlawful age and gender discrimination was barred by the "professional conduct or competence" exception in 7422. The court rejected the union's contention that management's 7422 assertion was a mere pretext for unlawful discrimination. (Similarly, in a posted USH decision dated 6/1/07, a nurse alleging that management's denial of specialized skills pay was racially motivated was not allowed to pursue a grievance.)

Amending 7422 will not hurt patient care. Opponents to S. 2824 are likely to suggest that labor will try to disrupt patient care if 7422 is amended. In fact, Title 5 makes the three exceptions in 7422 redundant and unnecessary. Federal sector unions are only authorized to negotiate on "conditions of employment" as that term is defined in 5 USC 7103(a)(14). In contrast, 5 USC 7106(a)(1) makes it a management right (i.e., not to be modified at the bargaining table) for an agency to determine its "mission."

Furthermore, a review of published cases that have come before the USH did not reveal even one attempt to interfere with medical procedures or other direct patient care matters.

Finally, if grievance rights can interfere with VHA operations, than why do hybrid Title 38 providers hired under Title 5 and working side by side with "pure" Title 38 providers have rights to grieve over these prohibited matters? For example, psychologists have full grievance rights while psychiatrists do not; licensed practical nurses have full grievance rights while RNs do not.

The current dispute resolution process for 7422 is broken and biased against employees. Opponents of S. 2824 are also likely to argue that employees already have a fair process though the USH for resolving 7422 disputes. Numbers tell a very different story: Of the 25 published USH decisions over the past three years, the USH ruled in favor of management one hundred percent of the time. Opponents are unlikely to mention that many, many more cases never get to the USH even though the law clearly states that he has sole authority to make these rulings. Across the country, human resource departments with no authority regularly make 7422 determinations and refuse to go through the proper USH channels.

The current 7422 process wastes taxpayer dollars. Finally, the VA's 7422 policies result in a great waste of taxpayer dollars that would be much better spent on patient care. The Asheville case previously discussed was pending for seven years. HR departments in facilities around the country regularly block or delay the Section 7422 review process, draining resources and staff time away from the VA's mission of caring for veterans.

S. 2639. Assured Funding for Veterans Health Care Act

AFGE supports S. 2639 to fund VA health care through mandatory, rather than discretionary appropriations. The current lack of predictability and adequacy in the VA health care funding process causes havoc every year in the budget process nationally, and in the ability of facility directors to plan for staffing, equipment and other operational expenses. VA health care is hurting from year after year of continuing resolutions, budget shortfalls and supplemental funding arriving long after the start of each new fiscal year. AFGE urges the Committee to

support reform of the funding system so that VA health care dollars are available on a timely and predictable basis, based on a funding formula that reflects current demand and cost of providing medical care to our veterans.

AFGE also supports alternative approaches, such as those being developed by the Partnership for VA Health Care Budget Reform (Partnership) that would utilize one-year advance appropriations, an approach that has a strong track record for other federal agencies. AFGE also supports annual Congressional oversight of the VA's health care forecasting model. Politics has already exacted a huge toll on the functioning of VA's world class health care system. Again, we urge this Committee to move forward with S. 2639 or the Partnership's alternative funding proposal.

S. 2799. Women Veterans Health Care Improvement Act of 2008

AFGE supports this important legislation to address the needs of the unprecedented number of female veterans entering the VA health care system. These veterans have unique medical and mental health needs that should be the focus of more research, best practices and health care innovations. S. 2799 will ensure that women veterans receive care through specialized programs and that more female providers are available to care for them. Currently, many women veterans must receive at least a portion of their health care outside the VA system. Women veterans deserve equal access to VA's exemplary in-house care, and S. 2799 will make it possible for VA to build the capacity to achieve that goal.

S. 2889. Veterans Health Care Act of 2008

AFGE objects to Section 3 of this bill. AFGE has no position on other sections of this bill. At a time when the VA is facing widespread difficulties recruiting and retaining physicians and relies increasingly on costly fee basis care, this proposal to weaken the already modest professional education benefit in 38 USC Section 7411 is a step in the wrong direction. Physicians already face a growing number of challenges to receiving reimbursement for continue medical education (CME). The $1000 maximum annual payment has not been increased since 1991, and today, the typical CME program costs three times that amount or higher.

VA's in-house CME courses are helpful but not sufficient to meet the increasingly high credit requirements set by medical boards. In addition, boards are setting more stringent standards for qualifying courses. We hear from many members that management is often reluctant to provide physicians with the time to attend grand rounds and other in-house courses.

In addition, VA physicians want and deserve exposure to a wide breadth of medical knowledge through courses offered by their colleagues in their practice areas outside the VA. The proposal in S. 2889 to give directors greater discretion to deny reimbursement for outside courses ("may reimburse" would replace "shall reimburse") is certain to result in more frustration by VA physicians already facing so many obstacles to receiving this modest annual reimbursement. The problem is already so widespread that AFGE filed a national grievance and settlement discussions with the VA are currently in progress.

Therefore, AFGE urges this Committee to defer any revisions to Section 7411 pending settlement of the national grievance, and further study of current state medical board requirements and costs of outside courses.

S. 2984 Veterans' Benefits Enhancement Act of 2008

We oppose Section 304. At a time when the VA is facing a critical nursing shortage and Congress is scrutinizing nurse pay policies to increase their effectiveness in recruitment and retention, it would be very unwise to eliminate the once-a-year reporting requirement in 38 USC 7451(f). VA's locality pay process needs greater, not less, accountability. As already discussed, management is unwilling to share survey pay data with employees at the local level. Congress must have this data at the national level to determine whether locality pay adjustments (or lack of adjustments) are justified, and whether additional funding or training needed to carry out this important nurse pay process effectively. This bill runs directly counter to the goals of Section 3 of S. 2969. We urge the Committee to reject Section 304 of S. 2984 and instead, expand the transparency and accuracy of the locality process as proposed by S. 2969.

Thank you.